173 (4)

No. 10-109

IN THE

Supreme Court of the United States

ANTHONY DISMUKE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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Petitioner's Supplemental Brief

Petitioner Anthony Dismuke submits this supplemental brief to request that this Court hold his Petition pending the resolution of *Sykes v. United States*, *petition for cert. granted*, 79 U.S L.W. 3194 (U.S. Sept. 28, 2010) (No. 09-11311).

Both *Sykes* and this case concern whether a state vehicular fleeing statute, which criminalizes nonviolent conduct, is a violent felony under the residual clause of section 924(e)(2)(B)(ii) of the Armed Career Criminal Act ("ACCA"). *Compare United States v. Sykes*, 598 F.3d 334, 335-39 (7th Cir. 2010), *with* Pet. App. at 11a-28a.

In *Sykes*, the Seventh Circuit held that Indiana's resisting law enforcement statute, which is violated when a person uses a vehicle to "knowingly or intentionally" flee from a law enforcement officer, was a violent felony. 598 F.3d at 336-37; Ind. Code § 35-44-3-3(b)(1)(A). Relying on this case, the Seventh Circuit found that such nonviolent flight satisfied this Court's two-prong test articulated in *Begay v. United States*, 553 U.S. 137, 144-45 (2008). *Id.* The Seventh Circuit held that Indiana's statute met the first prong of *Begay's* test because "the act of fleeing an officer in a vehicle 'involves a serious potential risk of physical injury to others.'" *Id.* at 336 (citation omitted). The Seventh Circuit also held that the statute's conduct was purposeful, violent, and aggressive and thus satisfied *Begay's* second prong, even though "a predicate offense may not *require* that an offender actually endanger others

through his flight." *Id.* at 336-37 (emphasis in original).

Based on the same reasoning, the Seventh Circuit found that Mr. Dismuke's conviction under the second, non-violent part of the Wisconsin vehicular fleeing statute was a violent felony. Pet. App. at 28a. Like the Indiana statute at issue in *Sykes*, the second part of the Wisconsin fleeing statute does not depend on whether the flight endangers anyone or anything. The Wisconsin statute is violated if an individual only "increase[s] the speed" of the vehicle or "extinguish[es]" its lights "in an attempt to elude or flee." Pet. App. 19a-20a; Wis. Stat. § 346.04(3). Nonetheless, the Seventh Circuit held that the second part of Wisconsin's statute met *Begay*'s first prong because it is "sufficiently similar in degree of potential risk to the residual clause's enumerated crimes." Pet. App. 17a n.3. In addition, the Seventh Circuit held that the nonviolent part of Wisconsin's fleeing statute met *Begay's* second prong for the exact same reason cited in *Sykes*: "[t]aking flight [in a vehicle] calls the officer to give chase, and aside from any accompanying risk to pedestrians and other motorists, such flight dares the officer to needlessly endanger himself in pursuit." Pet. App. at 26a (quoting *United States v. Spells*, 537 F.3d 743, 752 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2379 (2009)) (alteration in original); *see also Sykes*, 598 F.3d at 336 (finding that "besides daring a cop to endanger himself by giving chase, the act of fleeing police in a vehicle typically creates a risk of harm to other drivers and pedestrians" (citing *Spells*, 537 F.3d at 751-52)).

Because in both *Sykes* and this case, the Seventh Circuit found that nonviolent state vehicular fleeing statutes constituted violent felonies under the ACCA's residual clause based on the same reasoning, any decision that this Court reaches in *Sykes* will directly affect the outcome of Mr. Dismuke's Petition. As such, this Court should hold Mr. Dismuke's Petition pending the resolution of *Sykes*.

Respectfully submitted,

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October 13, 2010